

1 IN THE UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

4 DAVID LIPNICKI, ET AL., )  
5 Plaintiffs, )  
6 VS. ) CIVIL ACTION NO.  
7 MERITAGE HOMES ) 3:10-CV-605  
8 CORPORATION, ET AL., )  
9 Defendants. ) 9:25 A.M. TO 10:07 A.M.  
10 ) 11:04 A.M. TO 11:16 A.M.  
11 )

12 CLOSING ARGUMENT BY MS. WILLS  
13 BEFORE THE HONORABLE GREGG COSTA  
14 NOVEMBER 18, 2014

15 APPEARANCES:

16 **FOR PLAINTIFFS:**

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1 APPEARANCES CONTINUED:

2 **ALSO PRESENT:**

3 MR. DAVID LIPNICKI  
4 MS. DONNA ARMSTRONG  
5 MR. TIM GONZALEZ  
6 MR. MARK HOPKINS  
7 MR. MARK REYNOLDS, ESQ.  
8 MS. LAURA GOODWIN  
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25 Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1                   THE COURT: So with that we're ready for closing  
2 arguments.

3                   Ms. Wills, you're going to go first. Whenever you are  
4 ready, you can begin.

5                   MS. WILLS: Thank you, Your Honor.

6                   THE COURT: Give you a minute to set up.

7                   I think what we'll do, ladies and gentlemen: After  
8 Ms. Wills goes, we'll take a break -- short break and then go  
9 through the rest of the closing arguments. And then, like I  
10 said, we'll order lunch for you.

11                  Art, did we get the order forms?

12                  THE CASE MANAGER: I have them.

13                  THE COURT: Okay. So during the break, you can take  
14 care of that.

15                  All right. Ms. Wills, whenever you're ready.

16                  MS. WILLS: Thank you, Your Honor.

17                  Good morning, ladies and gentlemen. Well, it's been  
18 about a week, and it's been a very interesting week. And I  
19 really want to thank each and every one of you for coming here  
20 early every morning, sitting here patiently listening to all the  
21 evidence, listening to the witnesses, carefully paying attention  
22 to everything that was going on because I can tell you that this  
23 case means a great deal to these three plaintiffs that we're  
24 here representing.

25                  This case means a great deal to Donna Armstrong, to

1 Tim Gonzalez and to David Lipnicki, and I'd like to thank you on  
2 their behalf for coming here, for listening to the evidence, for  
3 keeping an open mind, and for paying such close attention. We  
4 thank you so much.

5 This is my opportunity to kind of summarize for you  
6 the things that the evidence has shown, what we believe were the  
7 really important key pieces of evidence, and to point out to you  
8 some of the things that we believe, based on the Court's  
9 instructions, will help guide you in making the right decisions  
10 here.

11 So as Judge Costa just told you, there are -- there  
12 are two basic issues, right? The first issue is: Were the  
13 plaintiffs inside salespeople or were they outside salespeople?  
14 And you really can't be both. You're either inside salespeople  
15 or you're outside salespeople.

16 And I submit to you, based on all the evidence that  
17 you've heard from the witness stand, from the deposition clips  
18 that you've seen of witnesses that also testified under oath,  
19 this was an inside sales position.

20 The second question that you're going to be asked is:  
21 How many hours did these plaintiffs work? And the judge just  
22 told you it's based on an estimation. There are no records.  
23 It's not their fault that there are no records.

24 Meritage didn't keep records. They could have kept  
25 records, but they didn't. So now we're left with their

1 reasonable estimation, and that's -- that's our only burden, to  
2 give you a reasonable estimation of the number of hours that  
3 they worked.

4 So I'd like to talk about this very first question  
5 that you're going to need to answer. Were the plaintiffs inside  
6 salespeople or were they outside salespeople? And I will tell  
7 you that the answer to that question of this being an outside  
8 salesperson job is absolutely no.

9 So the judge just went over the jury instructions with  
10 you, and I just want to hit on some of the key ones. I noticed  
11 you-all were paying very close attention when he read them, but  
12 I just want to focus on some of the key instructions.

13 So what is the outside sales exemption? It has two  
14 basic components. First, the plaintiffs have to have a primary  
15 duty of making sales, and here we agree that was the their  
16 primary duty, making sales. And we believe and it's our  
17 position and the evidence has shown that they actually had two  
18 products that they had to sell.

19 First, they had to sell the new homes, and, secondly,  
20 they had to also sell the Meritage MTH mortgages. Meritage  
21 required them and actually gave them an uptick on their  
22 commissions if they not only sold the new house, but they also  
23 sat them down and convinced them to buy a Meritage mortgage as  
24 well. So that was their primary job duty.

25 Now, the second issue is whether the plaintiffs were

1 customarily and regularly engaged away from the employer's place  
2 of business in performing their sales duties. So what's the  
3 employer's place of business?

4 Well, as the judge just outlined, the employer's place  
5 of business includes any fixed site, whether it's the  
6 plaintiff's home or whether it's an office. And for purposes of  
7 this case, that model home that you've heard so much about,  
8 including the sales office that's within the model home, that's  
9 inside sales.

10 The Houston corporate office that you've heard about  
11 where they had the Monday morning meetings, they did the  
12 call-a-thons and the phone solicitations and sometimes they'd  
13 have realtors come there to the corporate office, that's all  
14 inside sales. The time that they spent in these places, that's  
15 inside sales.

16 So what does "customarily and regularly" mean? Well,  
17 what does that mean? Well, the phrase "customarily and  
18 regularly" means it has to be a frequency that's greater than  
19 occasional. In other words, if you think it's just occasional,  
20 you know, maybe they did some sales activity occasionally,  
21 that's not enough. If you think it was just something that  
22 happened occasionally, that's not outside sales, and that's not  
23 customarily and regularly. It has to be greater than  
24 occasionally.

25 Customarily and regularly includes work that is

1 normally and recurrently -- normally and recurrently performed  
2 every workweek. Workweek after workweek after workweek,  
3 normally and recurrently.

4 As the Court also just instructed you, when you're  
5 looking at outside versus inside -- what's happening outside and  
6 what's happening inside, you have to look at the amount of time.  
7 Where were they spending their time? Were they spending their  
8 time inside -- inside that model, inside their sales office or  
9 inside the corporate office, or were they spending their time  
10 outside? You've got to look at where was their time being  
11 spent.

12 And then you have to also look at the relative  
13 importance of anything that they did if they ever were outside.  
14 Were they outside doing something important, something critical,  
15 something that mattered, or were all of the important things  
16 being done inside that model home sales office, inside the  
17 model, in the corporate office?

18 If you believe that they're spending most of their  
19 time inside, that the important things are being done inside,  
20 these ladies and gentlemen are inside salespeople and the  
21 outside sales exemption does not apply to them.

22 So as you get this charge and as you think about this  
23 case, ask yourselves -- you heard them all testify. You heard  
24 them say the word "rarely." Rarely. You heard them say that  
25 they rarely did anything outside of that office.

1           They were required to be there. That's where they  
2 were supposed to be. That's where they made their sales. In  
3 considering customarily and regularly, ask yourself: Were any  
4 outside things being done normally and recurrently workweek  
5 after workweek after workweek?

6           I think the evidence is exactly the opposite. If you  
7 look at what they were doing normally and recurrently, that was  
8 all inside the office, inside the model, inside the retail store  
9 that they were supposed to man, they were supposed to operate.  
10 That's what this job is about. That's what the evidence has  
11 shown.

12           And then, finally, when you're trying to decide  
13 customarily and regularly, you need to weigh the amount of time.  
14 Are they spending their time inside of the office, or are they  
15 spending their time outside of the office? Where are they  
16 spending their time?

17           You heard them testify. They're spending their time  
18 in that office because that's where they were required to be.  
19 That's where they had to be if they wanted to get an "up," if  
20 they wanted to get any sales. They had to be inside.

21           And then, also, you need to weigh: Where are the  
22 important things being done? Are the important things being  
23 done inside where they have all their tools, where their model  
24 is, where their showroom is, where their retail store is? Are  
25 the important things being done inside the office? And if the

1 important things are being done inside, these are inside  
2 salespeople and the outside sales exemption does not apply to  
3 them.

4 So I'd just like to kind of remind you of some of the  
5 facts as to why these people are inside salespeople because,  
6 again, you can't be both. You can't be inside salespeople and  
7 outside salespeople. You can only be one or the other.

8 And these people, Donna Armstrong, Tim Gonzalez and  
9 David Lipnicki, they were inside salespeople. So they worked  
10 inside of this beautiful model home. I know you guys are  
11 probably tired of hearing about the "wow" factor and how  
12 beautiful it is, but they really are stunning and they really  
13 are gorgeous. And they're done that way for a reason.

14 You heard about all the psychoanalytical data that  
15 goes into just selecting which model home you're going to have.  
16 They actually have study groups and marketing people. They  
17 spend thousands and thousands of dollars just trying to make  
18 sure that they build the right model home because this model is  
19 critical.

20 This is the heart of what they do. They spend 60, 70,  
21 \$80,000, and that's a lot of money just to furnish and decorate  
22 these models. This is the heart of what they do, and that's  
23 where these people were working, and that's where they were  
24 required to work. They are inside salespeople.

25 All of their tools -- and I won't go into this

1       *ad nauseam*, but you've heard repeatedly about their sales tools.  
2       That's where they are, okay? You can't sell somebody a home  
3       until you sit down with them and you go through your floor  
4       plans, you go over the elevations, you go through the feature  
5       sheets, you go through the price list, you go through the plat  
6       maps.

7               After you figured out a floor plan, after you figured  
8       out an elevation, after you figured out the features, then you  
9       have to sit down with the plat map, figure out where you have an  
10       available lot and whether or not you can even build that home on  
11       that lot. And all of this, ladies and gentlemen, happens inside  
12       because these are inside salespeople.

13               The lot fit analysis, which is what really has to be  
14       done before you ever know if the home is actually going to fit  
15       on a lot, again, all done inside, ladies and gentlemen. The  
16       community information, the tax rates, all of that -- again,  
17       these are tools that are inside, ladies and gentlemen.

18               And it has been unequivocal, unquestionable, all the  
19       contracts -- and you can't have a sale unless it culminates in a  
20       contract. You've got to have a contract. Every single contract  
21       is done inside the model home sales office. Those form  
22       contracts are right there on the computers. The salesperson  
23       sits there with the buyer, types in the information into the  
24       form on the computer.

25               They print it out right there in the sales office.

1 They sit there in the sales office. They go through the  
2 contract with the buyer, and the buyer signs and executes that  
3 contract right there inside the sales office. These are inside  
4 salespeople.

5 I mentioned to you earlier that they had two products  
6 that they were selling, and you've heard about this over the  
7 last week. The second product that they had to sell was the  
8 mortgage. And I don't care if Meritage wants to couch it as  
9 encouraging, explaining, trying to get them to do it. Bottom  
10 line is they required them, as a part of their job evaluation,  
11 to sell the mortgage.

12 They required a sit-down rate. For everybody that  
13 came in there to buy a new home, they had to also try to  
14 convince them to buy the Meritage mortgage through MTH Lending,  
15 and they would have the mortgage applications right there in the  
16 sales office.

17 *(Excerpt of video deposition of Mr. Wade Thomas played  
18 as follows)*

19 Q (BY MS. WILLS) And the time that these salespersons spent  
20 encouraging, trying to get, trying to capture, trying to get  
21 these folks to not just buy that new house but to buy that MTH  
22 mortgage as well, that time was spent in the sales office,  
23 wasn't it?

24 A Uh -- oh, first of all, you know, their responsibility was  
25 to encourage, uh, and I -- I believe, for the most part, that

1 that time would be in a sales office.

2 Q Do you believe or did Meritage believe that its new home  
3 salespersons were customarily and regularly selling the  
4 mortgages outside of the sales office?

5 A No, ma'am.

6 Q (BY MS. WILLS) So then Meritage knew that their  
7 salespersons were not customarily and regularly selling the  
8 mortgages outside of the sales office?

9 A That's correct.

10 (End of deposition excerpt.)

11 MS. WILLS: So you -- you heard it from the vice  
12 president of human resources for Meritage, out of his own mouth,  
13 that Meritage knew that the mortgage work was all being done  
14 inside of the sales office.

15 He was specifically asked were they customarily and  
16 regularly selling mortgages outside, and his answer was  
17 unequivocally no. These are inside salespeople, ladies and  
18 gentlemen.

19 Now, you've heard this model home referred to as a  
20 Meritage store, and you've heard evidence over the last week  
21 that -- that they had to man this store, that that's where they  
22 had to be because they were there to man a store. Just like if  
23 they worked at Dillard's or Macy's, they had to man a store, and  
24 this store had to be pristine.

25 They had to even pick up -- it was apparently

1 unacceptable if there were a couple of pieces of litter right  
2 there in the flower bed as you walked in. They had to fluff  
3 pillows. They had to straighten towels. This place had to be  
4 pristine. It had to be perfect because this was the Meritage  
5 store. This model, that's -- that's how they sold homes and  
6 mortgages.

7 It was even compared to being a store by -- you saw  
8 her -- Laura Goodwin, their sales trainer. She -- one of her  
9 sales jolts that she sent out was, "If I worked at a department  
10 store, would I be able to leave early to take care of a personal  
11 matter if no one else were there to take care of my customers?"

12 This was a store, ladies and gentlemen, and Donna  
13 Armstrong, Tim Gonzalez and David Lipnicki, they were working  
14 inside of that store manning that store.

15 *(Excerpt of video deposition of Mr. Richard Harvey played  
16 as follows.)*

17 A It's our model home. It's what we're using to sell homes,  
18 so it needs to be pristine.

19 Q Because that's what Meritage wants to do with its model  
20 homes, they want to have a showcase?

21 A Yes.

22 Q Why is that?

23 A Because that's representing our product and so it's our --  
24 it's the way that we -- it's -- it's a -- a -- I guess the  
25 physical vehicle we use to sell homes.

*(Excerpt of video deposition of Mr. Jeff Grobstein played as follows.)*

Q Is it important to you as a regional vice president that if you go and visit a sales office in a community that you're responsible for, that the sales office and model home appear neat and tidy?

A Yes.

Q Why is that important?

A Because it is our -- it's our store, it's our showroom.

It's, you know, where people come and learn about what we do.

*(Excerpt of video deposition of Mr. Steve Harding played as follows.)*

A It's a retail store and so we would, ideally, allow our prospects to come through those -- those sales offices during those two days a sales associate would be off.

Q In other words, because it is a retail store, you need someone to man the store during business hours?

A That would be ideal.

(End of video deposition excerpts.)

MS. WILLS: So, ladies and gentlemen, you heard it from Rick Harvey. He's the guy that's been with Meritage 25 years. He's over all of Texas, not just Houston. He's over all of Texas.

Rick Harvey, the very first man that you saw, he said, "This is our store. This is what we're using to sell homes."

1 Then you heard from Jeff Grobstein, an officer of the company, a  
2 regional vice president.

3 He said, "It's our store." And then you heard from  
4 Steve Harding. You also heard from Steve Harding here on the  
5 witness stand. He is the current Houston division president.  
6 There's no question that that model is the store, and they were  
7 supposed to be manning the store. This is an inside sales job.

8 We also know from the compensation agreement that they  
9 were required to be present at the sales office. They had to be  
10 present there for all business hours on all days.

11 They were responsible for this Meritage model, this  
12 store, seven days a week, and the only way they could get two  
13 days off is if they had someone to cover the store when they  
14 were going to be out. This is an inside sales position that  
15 required them to man this store.

16 They were also subject to being written up if they  
17 were out of the store, outside of the model. You heard Bobby  
18 Allen talking about he could remember the 11 people that he  
19 actually counseled for being outside of the model. You heard  
20 Jeanne Conger tell you, "It's a possibility. I could have  
21 written somebody up for being out of the model."

22 If we look at this one disciplinary action form, this  
23 salesperson is being written up and told that she has to make  
24 sure the sales office is covered daily from 10:00 to 7:00 and  
25 that she would have to inform them prior to being out of the

1 office for any reason. Any reason that she's out of that  
2 office, she's got to give prior notice to management.

3 She's told in this formal written disciplinary action  
4 form that this is a serious situation and that she has to make  
5 immediate improvement. And this is a written -- you've heard  
6 write-ups were done with human resources. You couldn't just  
7 write somebody up.

8 You had to have human resources. It had to be  
9 documented. This is a serious situation, and she's being told  
10 in writing if you're going to be out for any reason, you must  
11 notify management before you can be gone for any reason.

12 Here's another disciplinary action form. "Dan is  
13 expected to be on time to work every day and work regular  
14 business hours." This is an inside sales job. You've got to  
15 show up, and you've got to work regular scheduled business  
16 hours.

17 He's also told in this formal disciplinary action  
18 form, "The model home must be attended at all times" -- "all  
19 times during business hours. Leaving the model unattended by a  
20 salesperson and unpresentable leads to a potential loss in sales  
21 and a decrease" -- "decrease in profitability for the company."

22 It's clear, ladies and gentlemen, Meritage wanted  
23 their salespeople to be inside that model home sales office.  
24 This is an inside sales job. All of the evidence points to this  
25 being an inside sales position.

1                   Now, you've heard the evidence. The plaintiffs were  
2 paid on a straight commission basis. They didn't get a sale,  
3 they weren't going to get a commission. And you -- you heard  
4 Steve Harding say, "You know, sometimes we'd give them a draw."

5                   A draw was basically a loan, which meant that Donna  
6 Armstrong could sit there running the Meritage model for 55, 60,  
7 70 hours a week, and at the end of that week she could actually  
8 be in the hole to Meritage. She could be there for up to 70  
9 hours that week, and at the end of that week, if she hasn't sold  
10 anything, the only thing she might get, if she's lucky, would be  
11 a loan from Meritage that she would have to pay back to Meritage  
12 later.

13                   That's the way the Meritage system -- their  
14 compensation worked. Now, the only way -- the only way under  
15 Meritage's system -- and you've heard it repeatedly. The only  
16 way you could possibly get a sale was to be present in that  
17 sales office. If you weren't there, you weren't going to get a  
18 sale, you weren't going to get an "up."

19                   So it is, frankly, preposterous and it strains  
20 credibility to believe that somebody is going to be out, I don't  
21 know, running around the neighborhood with a walk book and a big  
22 plat map or, I don't know, maybe going by a realtor office and  
23 dropping off some fliers where they're going to call the call  
24 center, that they're going to be out doing those things when the  
25 only way -- the only way they're going to earn a commission is

1 to be right there in the sales office.

2 Not only are they contractually required to be there,  
3 not only will they be written up if they're not there, but it's  
4 the only way that they're going to earn a commission. It's the  
5 only way under the system that Meritage has devised.

6 In order to get a commission, you must be the person  
7 right there to register traffic when it comes in, to get that  
8 prospect to fill out a guest card. That's the only way that  
9 you're going to get a commission. And the only evidence you've  
10 heard is that those guest cards are done right there in the  
11 model -- inside the model, inside sales activity.

12 Under their "up" system, there is no question that a  
13 prospect is somebody who physically walks into the sales office.  
14 The sales consultant that is onsite that day is the person who's  
15 going to get the commission. So if you're not the person that's  
16 onsite that day, you're not going to get a commission.

17 (Excerpt of video deposition of Mr. Steve Harding played as  
18 follows.)

19 Q So it's really the person who's in the office that's going  
20 to get the prospects, typically?

21 A What I would characterize that with is -- yes.

22 (Excerpt of video deposition of Mr. Jeff Grobstein played  
23 as follows.)

24 Q Do you believe that getting an up or a prospect that walks  
25 in the door, being the person to get to greet that person, do

1 you believe that that's important to a salesperson?

2 A Yes.

3 (By Ms. Wills)

4 Q Why?

5 A If you don't have an up, you don't get a sale.

6 *(End of video deposition excerpts.)*

7 MS. WILLS: If you don't have an "up," you don't get a  
8 sale, and if you're not in that model home sales office, you're  
9 not going to get an "up." This is an inside sales position.

10 Now, I wanted to point out something else from the  
11 instructions that Judge Costa just read to you. I think it's  
12 really important that you understand that in order to be exempt  
13 outside sales work, you have to only look at the work that --  
14 that an employee does with respect to their own outside sales,  
15 their own solicitations, their own sales efforts.

16 So, for example, if they're dropping off a flier at a  
17 realtor's office, if you even consider that to be important --  
18 because you're supposed to weigh is this important or is this  
19 not important. But -- but even if -- if you were to believe  
20 that's important -- I'll tell you it didn't seem important to  
21 me.

22 But if you were to do that and somehow they got stuck  
23 in a box, didn't get thrown in the trash can, they're going to  
24 be not trying to develop their own sales, this is for Meritage.  
25 The evidence is going to show that these fliers they drop off,

1       they direct people to call who? To call this Jennifer lady, the  
2       online person. And you heard Steve Harding. Now they have them  
3       call the call center.

4               This isn't work that they were doing to -- if they did  
5       it on a rare occasion, to promote their own sales. This was to  
6       promote Meritage. And in order to be considered outside sales  
7       work, it has to be something in conjunction with their own  
8       sales, not something where maybe somebody else is going to get  
9       the phone call or maybe somebody else is going to get the sale.  
10      It has to be their own work, their own sales.

11               Which means that all that teamwork you've heard  
12       about -- Meritage believes in teamwork. Hey, you got to do  
13       teamwork. I don't care if you're not going to get the  
14       commission. I don't care if it's not your sale. You still got  
15       to pitch in and do teamwork.

16               That means customer comes in, they're not your buyer,  
17       you still got to help them regardless. That means you've got to  
18       do customer service even if you never even sold these people a  
19       home. They're calling, you got to help them. You've got to do  
20       warranty work. They're not my buyer, you still got to do  
21       warranty work.

22               All those things, ladies and gentlemen, those are  
23       inside sales activities. The only way they can be outside  
24       exempt sales activities is if it's somehow specifically for  
25       their own sales.

1                   Now, you heard a lot about marketing. And I'm not  
2 going to belabor this, but needless to say, this is a big  
3 outfit, okay? They're pretty sophisticated. They've got the  
4 realtor relationship manager or business development manager  
5 people, whatever you want to call them, but those are the folks  
6 that are going out actually forming the relationships with  
7 realtors.

8                   They're the ones taking people out to lunch. They're  
9 the ones taking people to play golf. They're the ones  
10 developing this relationship.

11                  These people didn't even have a budget for something  
12 like that -- didn't have a budget. You saw the e-mail. We're  
13 not paying any money for you to do any realtor relationship  
14 things.

15                  No, the -- the only thing that these folks were  
16 allowed to do was maybe have some donuts in their model and  
17 invite some realtors to come. You know, host some events right  
18 there in their model. That -- that was -- that was what they  
19 did, or, you know, they -- they would interact with realtors  
20 when they come in with their customers.

21                  I mean, that's the best time to interact with them.  
22 Here they are. They're in your model. They're in your store.  
23 You can show them your product. That's when you interact with  
24 them.

25                  They also call them right there from the model home

1 sales office. They e-mail them right there from the model home  
2 sales office. Inside sales. This is an inside sales position.

3 All of the big marketing stuff -- you saw the "wow"  
4 commercial -- wow -- the billboards, the advertisements, the  
5 website, the call center, the promotions, all of that, that's  
6 all done by the marketing department. And what's the marketing  
7 department trying to do? They're trying to drive people to go  
8 to the model home sales office where that's where they're going  
9 to find the salespeople.

10 Now, the plaintiffs are inside salespeople. Just to  
11 summarize, they worked in a model home sales office selling new  
12 homes and mortgages. They were responsible for operating the  
13 store. They rarely took customers out for any reason.

14 So when you're looking at customarily and regularly,  
15 it has to be more than occasional. This doesn't even rise to  
16 the level of occasional. It has to be more than occasional.

17 It has to be normally and recurrently done workweek  
18 after workweek after workweek. The evidence that you've seen --  
19 the only evidence you've seen is that if they ever took anybody  
20 anywhere, it was very rare. And if they did, I mean, I don't  
21 even know that it was anything important.

22 You heard from one home buyer of Tim Gonzalez who  
23 said, "Yeah. I came in. He had the one perfect home for me. I  
24 knew immediately that's the home I want. I want to go see this  
25 house."

1                   Now, she wasn't from that area. Her realtor wasn't  
2 from that area. So Tim Gonzalez took them over and showed them  
3 that inventory home.

4                   Now, that's one buyer, only buyer that Meritage  
5 brought in here to you. Now, you heard that an average week,  
6 about ten people come into a model home sales office. That's  
7 average. Frankly, that's probably low. But that means that  
8 over 500 buyers are going to come in a year, and you heard Tim  
9 Gonzalez worked there two years.

10                  So in two years he saw over a thousand prospective  
11 buyers, and they provided you with one person out of over a  
12 thousand where he took her and showed her and her realtor this  
13 inventory home -- one in a thousand. He told you he could  
14 remember three occasions, and we're talking about over a  
15 thousand prospective buyers.

16                  That is not customarily and regularly. I would tell  
17 you that is the rarest of rare, and that does not rise to the  
18 level of outside sales.

19                  It's very clear that they rarely even dropped off  
20 these fliers and gave them to the receptionist, but if they did,  
21 they weren't making presentations. The realtors weren't even  
22 there. They were dropping off some fliers where maybe -- maybe  
23 one day they'd get a call from that, but more likely than not  
24 they were going to call the number on there, which went to the  
25 toll free number to the online center.

1                   The evidence is also undisputed that they never ever  
2 went to any customer's home or any customer's place of business  
3 in order to sell them a new home or a mortgage.

4                   So the very first question you're going to get -- the  
5 very first question, question No. 1, is going to be on the  
6 outside sales exemption.

7                   Do you find that Meritage -- not us, Meritage. We  
8 didn't have to say a thing. This is Meritage. Meritage has to  
9 prove to you by a preponderance of the evidence that these three  
10 plaintiffs, Donna Armstrong, Tim Gonzalez and David Lipnicki,  
11 that they were employed in the capacity of an outside  
12 salesperson under the outside sales exemption, and they can't be  
13 both.

14                   You're either inside sales or you're outside sales.  
15 And it's very clear here that the outside sales exemption does  
16 not apply to these three plaintiffs. So we would ask, when you  
17 get this question, for all three of them please check "No."

18                   So the next question you're going to be asked is how  
19 many hours did they work each workweek. You heard Donna  
20 Armstrong's testimony. She conservatively estimated that she  
21 worked an average of 55 to 60 hours a week.

22                   I would submit that Donna deserves to get the higher  
23 end of that because she was being conservative in her estimate.  
24 Tim Gonzalez estimated 70 hours a week. David Lipnicki  
25 estimated 65 to 70 hours a week, and, again, he was being

1 conservative. I would submit that he should get the higher end  
2 of that estimate.

3 So what are hours worked? Hours worked include all  
4 time spent by an employee that was primarily for the benefit of  
5 the employer or the employer's business, and it's whether or not  
6 the employer knew or had reason to believe that the employee was  
7 doing the work.

8 Well, the evidence shows that -- that they knew. They  
9 knew the long hours that they were working. They knew that that  
10 sales office was going to be open 363 days out of the year.  
11 They only close two days, Christmas Day and Thanksgiving Day.

12 That means that New Year's Eve, New Year's Day,  
13 Mother's Day, Father's Day, Fourth of July, Labor Day, Easter,  
14 that sales office was open and these folks were working.

15 Now, in terms of coming up with a number of hours, I  
16 don't want you-all to believe that somehow they have to give you  
17 some sort of figures. They can't do that, and the reason that  
18 they can't give you an exact number is because Meritage didn't  
19 keep time records.

20 You heard them say they could have kept time records.  
21 They even looked at alarm codes. They could have kept records,  
22 but Meritage did not follow their requirement to keep records.  
23 The law requires the employer to keep the records.

24 Because they failed to keep records, now we only have  
25 their reasonable estimation. And that's all the law requires,

1 that they give you a reasonable estimate of the number of hours  
2 that they worked. That's all, just a reasonable estimate.

3 Now, their reasonable estimate is based on the fact  
4 that they worked beyond even the stated business hours. They  
5 would arrive early to do those opening procedures you heard  
6 about. They worked through lunch.

7 They would stay late. Then they would do the closing  
8 procedures. Sometimes they worked six to seven days a week.  
9 They worked holidays, and they worked weekends. And Meritage  
10 knew this.

11 *(Excerpt of video deposition of Ms. Jeanne Conger played as*  
12 *follows.)*

13 Q And how many hours a week did your husband work when he  
14 worked at Pulte?

15 A Probably 70 hours a week.

16 Q With your experience in the industry, did you find your  
17 husband's work hours of 70 hours a week as a salesperson to be  
18 pretty much the norm for the industry?

19 A Yes.

20 *(Excerpt of video deposition of Mr. Steve Harding played as*  
21 *follows.)*

22 Q (BY MS. WILLS) So it's true that some salespeople work more  
23 than five days a week?

24 A That is possible.

25 Q Isn't [sic] also true that in advertising for this position

1 Meritage says that salespersons must be able to work over 40  
2 hours a week, work weekends and nights if necessary?

3 A Yes, ma'am.

4 Q And, in fact, they also advertise this position as being one  
5 where they have to be available to work, as needed, seven days a  
6 week?

7 A Um, yes, ma'am.

8 *(End of video deposition excerpts.)*

9 MS. WILLS: So the very next question you're going to  
10 get -- after you answer question one "no," the next question  
11 you're going to get is: How many hours did they work? And the  
12 very first person's going to be Donna Armstrong because it's in  
13 alphabetical order, and you're going to have a workweek for each  
14 week that's within the relevant time period.

15 So you're not going to have a workweek for the entire  
16 time that she worked there. It's only going to be for the time  
17 that the Court has determined is the relevant time period.

18 So you're going to have to put a number into each and  
19 every one of those blanks in order for Ms. Armstrong to be able  
20 to recover for those hours worked. We're asking that when you  
21 get to this question two for Donna Armstrong, that you fill in  
22 the number 60 in each and every one of those blanks for each and  
23 every week because that is Donna Armstrong's reasonable  
24 estimate, and the law says that's -- that's all she's required  
25 to do, give you a reasonable estimate.

1 Her reasonable estimate has in no way been  
2 contradicted by Meritage. They've not contradicted her  
3 reasonable estimate. Jeanne Conger, who was over Houston who  
4 actually worked with Donna -- didn't supervise her but was two  
5 levels above her -- said 70 hours is the norm. So 60 hours for  
6 Donna is certainly reasonable.

7                   Then you're going to get also as a part of question  
8                   two -- and Donna Armstrong's going to be two or three pages of  
9                   just blanks with weeks. Then you're going to get to Tim  
10                  Gonzalez, which is a shorter period.

11                   We're asking that for each and every blank there for  
12 Tim Gonzalez, that you put 70 hours in for Tim, which is the  
13 reasonable estimate that he gave. And that's basically what  
14 Jeanne Conger told you, 70 hours is the norm for the industry.

17 Now, I'd like to conclude by sort of stopping where  
18 Mr. McLaughlin started with you last week. Do you remember when  
19 he did his opening statement? He told you that this case was  
20 going to be about credibility, and I believe that it is about  
21 credibility.

22 And based on everything you've sat here and listened  
23 to, what you've seen, what you've heard, I want you to ask  
24 yourselves about the credibility of Meritage. Let's look at  
25 their credibility. Now, they would have you believe that the

1 outside sales exemption applies to this clearly inside sales  
2 position, so let's take a look at what they did in order to try  
3 to one day convince a jury like you of this.

4 Well, on the very first page of their compensation  
5 agreement, they have something that, frankly, defies all  
6 credibility. They say, "The associate must customarily and  
7 regularly take customers to see model homes."

8 Well, they're stationed in a model home. They're not  
9 going to customarily and regularly take anybody to see a model  
10 home because that's where they are. And the evidence has shown  
11 that if they wanted somebody to see another model home, they  
12 give them directions and send them over to that model home so  
13 that the other salesperson could do teamwork and help with  
14 somebody else's sale.

15 Then they go on to say they're also supposed to take  
16 them to see sites. Well, ladies and gentlemen, the only way to  
17 pick out a site was to select a floor plan, an elevation, and to  
18 use that plat map. It completely defies logic that you're going  
19 to go out there with some kind of a weird tool kit that nobody  
20 ever provided to them with some cones -- and Donna's going to be  
21 out there. She's going to put on her boots. I think Amy Fisher  
22 said her boots were knee high.

23 You're going to put on some boots and some spray, and  
24 you're going to spray out the pool and have some rope. That's  
25 not -- that's not credible at all. That's not even logical.

1           You're not going to take folks out there when you need  
2 a surveyor, you need construction people, you need an engineer.  
3 They can't go out there and tell you where your house is going  
4 to be built. Completely illogical.

5           Then they go on to say -- just to show you what little  
6 credibility Meritage has, they go on say then they're supposed  
7 to call upon customers at their homes. Have you heard a shred  
8 of evidence of any salespeople going to somebody's house to sell  
9 them a new house? Absolutely defies all credibility.

10           And then they say --

11           THE COURT: About five minutes, Ms. Wills.

12           MS. WILLS: -- you're supposed to travel to various  
13 locations -- thank you, Your Honor -- in order to conclude the  
14 sales transaction. Ridiculous.

15           The only evidence that you heard was that the  
16 contracts -- which is obviously how you're going to conclude a  
17 sales process, right? You got to get the contract -- they  
18 happen 100 percent of the time inside of the office.

19           You heard their vice president of human resources  
20 admit the mortgages, 100 percent of the time those were done in  
21 the office. They already knew, no, they're not customarily and  
22 regularly out selling mortgages.

23           I ask you to look at the credibility of Meritage and  
24 what they brought before you and the kind of evidence that they  
25 brought in this courtroom before you. Look at their

1 credibility. They're telling you the outside sales exemption,  
2 ladies and gentlemen, they don't even know what the outside  
3 sales exemption is.

4 I want you to listen again to Rick Harvey, the guy  
5 who's over all of Texas. Twenty-five years he's been with  
6 Meritage. I want you to listen to what he has to say about the  
7 outside sales exemption. Then I want you to listen to Jeff  
8 Grobstein, regional vice president, officer of Meritage.

9 I want you to listen to what they have to say about  
10 the outside sales exemption, and then I want you to evaluate the  
11 credibility of Meritage.

12 *(Excerpt of video deposition of Mr. Richard Harvey played  
13 as follows.)*

14 Q What's the outside sales exemption?

15 A I don't know.

16 Q So is it fair to say that you have never undertaken to do  
17 anything to determine whether or not any of the salespersons  
18 working, in any of the divisions that you've been in charge of,  
19 whether or not they are workers that would fall under the  
20 outside sales exemption?

21 A Uh, I -- I haven't done anything personally, no.

22 Q (BY MS. WILLS) Do you know of anything that's been done?

23 A No.

24 Q As you sit here today, do you have a belief as to whether or  
25 not the outside sales exemption applies to the -- all those

1 salespersons that work in your various divisions that you're  
2 responsible for?

3 A I don't know what that is.

4 Q (BY MS. WILLS) So you have no idea whether that exemption  
5 would apply to them?

6 A I have no idea.

7 (Excerpt of video deposition of Mr. Jeff Grobstein played  
8 as follows.)

9 Q What's the outside sales exemption to the Fair Labor  
10 Standards Act?

11 A I don't know.

12 (End of video deposition excerpts.)

13 MS. WILLS: The reason that they don't know, the  
14 reason they've never heard of it is because it doesn't apply.  
15 These are inside salespeople, ladies and gentlemen, and we ask  
16 that when you get that jury form, you indicate on there this is  
17 not an outside sales position.

18 They don't even know what it is. They don't know what  
19 it is because it doesn't apply. They're inside sales.

20 I'd like to thank you for your time and your  
21 attention. And I'll get one more opportunity to talk to you  
22 again, but, again, we ask that you look at the credibility of  
23 Meritage. Look at what they did. Look at the evidence that  
24 they gave you and ask yourselves whether or not you can believe  
25 anything that they say.

1 (Other matters pertaining to jury trial heard.)

2 THE COURT: All right. Ms. Wills, your rebuttal?

3 MS. WILLS: Yes, Your Honor, just a brief rebuttal.

4 Ladies and gentlemen, one thing I'd agree that

5 Mr. McLaughlin said. I'd like you to use your common sense  
6 here. He's right, your common sense. I want you to use your  
7 common sense and ask you: Does your common sense tell you that  
8 they're inside sales or outside sales? Because they can't be  
9 both.

10 You have to decide: Is this an inside sales job?

11 Because if it's an inside sales job, Meritage should have been  
12 keeping up with all those alarm codes that they were checking  
13 that they can't seem to find these days. Meritage should have  
14 been keeping time records because this is an inside sales job.

15 Now, for some strange reason Meritage wants you to  
16 believe that the "up" system was just something that only  
17 happened when you had two people in an office and there were  
18 altercations, which you heard about those.

19 People were fighting over customers. They weren't  
20 going to be out dropping off some fliers or, I don't know,  
21 wandering around with that look book or wandering around with  
22 that kit. They were actually fighting over the customers that  
23 came into the office.

24 The "up" system -- and you heard the executive say it.  
25 Not my words, you heard the words straight out of their mouths.

1 The "up" system meant that you had to be present to get a sale.  
2 There's no question about that. If you weren't there, you  
3 weren't going to get a sale. You had to be there in the model  
4 home sales office because this is an inside sales job.

5 Now, he made -- Mr. McLaughlin made a big deal of  
6 saying Wade Thomas -- you remember him? Vice president of human  
7 resources. I showed you the clip from him, Wade Thomas, vice  
8 president of human resources.

9 Now, it's interesting that plaintiffs are the only  
10 ones that showed you any testimony from Mr. Thomas. He's their  
11 vice president of human resources. Why wasn't he here  
12 testifying to you?

13 You know, I -- I showed you -- I showed you testimony  
14 from the vice president of human resources, and I specifically  
15 asked him the question about whether or not these mortgages were  
16 being customarily and regularly sold outside of the office, and  
17 he said no, of course not. Meritage knew that. This was all  
18 inside sales work that they were doing with these mortgages.

19 We're not running away from anything, ladies and  
20 gentlemen. We're the only ones that showed you testimony from  
21 their executives, and I mean the high-up executives.

22 I'm talking Rick Harvey, the guy that's been with  
23 Meritage for 25 years who's over all of Texas, the guy that can  
24 hire and fire a whole bunch of people, the guy that was in  
25 charge of everything. We're the only ones that presented his

1 testimony to you.

2 We're not the ones who are running away here. We're  
3 not the ones who are running away from the truth here.

4 Now, you've seen a lot of e-mails. You're going to  
5 get them. You're going to have a chance to look at them. When  
6 you look at these e-mails, you'll see things like Donna  
7 Armstrong, 8:09 at night, saying, "Sorry my report is late. I  
8 was working with a buyer that couldn't decide tonight."

9 Another e-mail she sent at 7:28 p.m. "Sorry, David.  
10 My last customer just left."

11 When you read those e-mails, it's going to be very  
12 clear to you these inside salespeople, Donna and David and Tim,  
13 they're in the office. This is an inside sales position.

14 Now, I just want to be clear about customarily and  
15 regularly. We talked about that. Customarily and regularly  
16 must be greater than occasional, more than occasionally, okay?

17 If it's just occasionally, that's not enough. It's  
18 got to be more than occasionally. It also has to be work that  
19 is normally and recurrently performed every workweek -- normally  
20 and recurrently performed every workweek.

21 And when you're trying to decide customarily and  
22 regularly, you've got to do a balancing. That's the Court's  
23 instruction to you. You're supposed to consider the relative  
24 amount of time spent inside the office versus outside of the  
25 office.

1 Now, Mr. McLaughlin showed you their declarations.  
2 They've always maintained that, "I spent well over 90 percent of  
3 my time in the model home sales office," and they later added  
4 most of the other time was spent up at the corporate office.  
5 Both of those are inside sales. They're Meritage's places of  
6 business. We're not running away from anything.

7 What you didn't hear and what you haven't seen any  
8 evidence of is -- they're the ones with the burden. Why didn't  
9 they come in here and show you what percentage of time they  
10 claimed they're working outside of the office? That's because  
11 this is an inside sales position.

12 And then the other thing that the Court's instructions  
13 tell you to do: Look at the amount of time. I mean, some  
14 workweeks they told you, "I spent 100 percent of my time in the  
15 sales office, in the model home or at the corporate office."

16 So the second thing you've got to do is you've got to  
17 weigh the importance. Where are the important things happening?  
18 Are they happening inside Meritage's places of business, that  
19 model home, that sales office, or are they happening outside?

20 You have seen it. Everything that's important, that's  
21 critical is happening right there inside that model home sales  
22 office.

23 Even Mrs. McClellan, the home buyer you saw, she sat  
24 right there and told you, "It didn't matter whether Tim Gonzalez  
25 showed me and my realtor that house or not. I was going to buy

1 it. What he did didn't matter. That wasn't important to me."

2 No. The important things here happened inside the model home  
3 sales office.

4 Now, finally, I have to tell you I was shocked -- I  
5 was shocked when I heard Mr. McLaughlin get up here and talk to  
6 you about credibility, talk to you about fleeing the scene and  
7 running away. I think he just told you Meritage is now ready to  
8 flush -- I think his words were "flush away" Amy Fisher's  
9 testimony.

10 Amy Fisher, that young woman that you saw here, she  
11 was handpicked by Meritage. All the salespeople they had, they  
12 went and they handpicked this young woman. Six weeks ago they  
13 had their lawyers meeting with this young woman.

14 Then, just before her testimony, they were sitting --  
15 they were meeting with her. These lawyers were meeting with  
16 Amy Fisher, and now they're ready to flush her away. They put  
17 that young woman on the stand -- after meeting with her, sitting  
18 down with her, talking to her, then they put her up here on the  
19 stand.

20 This young woman worked there 12 years, and they  
21 handpicked her. They put her on that stand. Their lawyers met  
22 with her. They talked to her, and then they put her up here.

23 And what did Amy Fisher do? There's no question. She  
24 wasn't honest with you. She was completely dishonest.

25 But Meritage put her on that stand. The only reason

1       she got on that stand and she said the things that she did was  
2       because she was trying to support a ridiculous story that  
3       Meritage came into this courtroom to tell you.

4                   So she sat up there, and she said, "Sunday" -- just  
5       two days ago Sunday -- "was a typical workday for me, my normal,  
6       typical workday," and from then on she lied about everything,  
7       what she did that day.

8                   She told you, "I took three customers out to see  
9       inventory homes." She told you their names, the addresses where  
10      she took them, the inventory homes that she took them to see,  
11      and she did all this because she was trying to support this  
12      ridiculous story that Meritage wants you to believe.

13                  So she sat up there saying all these things. "Oh, my  
14      gosh. I had just a few pieces of traffic, and I was taking  
15      people out and they were following me in my car. And I had my  
16      car seat in the back, and so they followed me." I mean, a whole  
17      story -- a whole fabricated story.

18                  But we know what the truth is. You actually got to  
19      see, for the first time, a real day in the life of a Meritage  
20      salesperson. A real-world day, okay? You heard from Shelly  
21      Schiebe, HP -- former HPD officer, 30 years. She does fraud  
22      investigations.

23                  You heard from her. She put Amy Fisher under  
24      surveillance. We wanted to see what is a real -- what does a  
25      real day look like.

1                   She sat there, and she watched Amy Fisher go into that  
2 model home at 11:54 a.m. Amy Fisher never left the entire day.  
3 She stayed in that model home sales office the entire day, and  
4 she didn't leave until 6:15 when it was time for her to go home.

5                   She didn't leave. Her trainee assistant didn't leave.  
6 They both were in that model home sales office the entire day,  
7 and that's real world, and that's what really happens when  
8 you're a Meritage home salesperson. You can sit if you want and  
9 watch the surveillance tape. Her car doesn't move.

10                  She doesn't go get in her car and go show anybody  
11 anything. She doesn't go out with a big bag of tools that  
12 nobody seems to have. She didn't do any of that. She sat in  
13 that model home sales office because that's a typical day.

14                  That's what they do. That's what this job is about.  
15 And the sad thing is Meritage knew that, but they put that young  
16 woman on the stand.

17                  They put that young woman on the stand to support  
18 their ridiculous story, and you saw her sitting up there. And  
19 at the end of the day, after this HPD former officer, 30-year  
20 veteran, fraud investigator has put her under surveillance,  
21 called her out, shown her to be completely fabricating her whole  
22 story, she had to come back in here. And that young woman that  
23 Meritage put on the stand had to sit there and take the Fifth  
24 Amendment to try to avoid incriminating herself on a possible  
25 penalty of perjury.

That's what Meritage did. That's what they did. Those are the lengths that they are willing to go to to support a ridiculous, fabricated story. The day that we saw Sunday for Amy Fisher, that is a typical day because this is an inside sales position.

Please don't let Meritage get away with this. Don't let them get away with this. We want you to do what's right. This is an inside sales job, and what they did with Ms. Fisher wasn't right.

It wasn't right. They had their lawyers meet with her, put her up there knowing full well that this is an inside sales job. It was not right.

What they're trying to do to Donna Armstrong, to Tim Gonzalez, to David Lipnicki, it's not right. We're asking you to do what's right. This is an inside sales job. Please tell them that this is an inside sales job. Make them comply with the law of how you're supposed to pay inside salespeople.

I thank you so much. I thank you for listening to this case because this case is so important to these salespeople. I appreciate your time and your attention, and we are very hopeful that you-all are going to do the right thing and not let Meritage get away with this. Thank you.

\* \* \*

*(End of requested transcript.)*

1 I certify that the foregoing is a correct transcript  
2 from the record of proceedings in the above matter.  
3

4 Date: April 22, 2015

5 /s/ Heather Alcaraz  
6 Heather Alcaraz, RMR, FCRR  
7 Official Court Reporter  
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